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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,
12 Plaintiff,
13 v.
14 REAL PROPERTY LOCATED AT 475
15 MARTIN LANE, BEVERLY HILLS,
16 CALIFORNIA, et al.,
17 Defendants.

CV 04-2788 ABC (PLAx)
[Consolidated with CV 04-3386
ABC (PLAx), CV 05-3910 ABC
(PLAx), and CV 09-7568 ABC
(PLAx)]
ORDER RE: PRELIMINARY
INJUNCTION

18 Pending before the Court is Claimant Optional Capital Inc.'s
19 Request for a Preliminary Injunction barring East West Bank from
20 proceeding with a trustee sale of the real property at 924 N. Beverly
21 Drive, Beverly Hills, California ("Motion"). On July 1, 2011, the
22 Court issued a temporary restraining order pending resolution of the
23 request for preliminary injunction, and an order to show cause ("OSC")
24 establishing a briefing schedule. On July 6, 2011, Optional and
25 Intervenor Eric Honig each filed a Response to the OSC. On July 11,
26 2011, East West Bank filed an Opposition to the Issuance of a
27 Preliminary Injunction. On July 13, 2011, Optional and Honig filed
28 Replies. The matter came on for hearing on Monday, July 18, 2011.

1 Upon consideration of the materials submitted by the parties, argument
2 of counsel, and the case file, the Court hereby **GRANTS** the Motion.

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4 **I. BACKGROUND**

5 This Order assumes familiarity with the background of this case.
6 As such, the Court will set forth only as much background as is
7 relevant to the disposition of this Motion.

8 This matter started out as a forfeiture case filed in May 2005 in
9 which the United States sought the forfeiture of certain assets in
10 possession of the Kim Claimants. The Government seized various Kim
11 assets located in the United States, including the residence at 924 N.
12 Beverly Drive ("property"). Erica Kim purchased that property in 2002
13 using a \$1.1 million loan provided by United Commercial Bank. East
14 West Bank is UCB's successor in interest as to that loan and holds the
15 Promissory Note and Deed of Trust.

16 On March 13, 2007, the Court granted the Kim Claimants' summary
17 judgment motion against the Government's forfeiture case; the Ninth
18 Circuit affirmed that decision on October 3, 2008. The Government's
19 forfeiture case was therefore extinguished. Following additional
20 litigation, the Court found that the other claimants' claims had also
21 been adjudicated and were therefore extinguished. The Ninth Circuit
22 reversed and, by its mandate issued January 28, 2011, remanded the
23 matter to this Court for it to adjudicate the competing claims of all
24 claimants to the seized properties. These competing claims to the
25 property have yet to be adjudicated.

26 Claimant East West Bank ("EWB") issued a Notice of Trustee Sale
27 ("NTS") indicating that it would sell the property on July 7, 2011;
28 the sale was postponed to July 20, 2011. EWB states that it is

1 entitled to foreclose on the property and conduct a trustee's sale
2 because Erica Kim has been in default on her loan since March 2008 and
3 has been living at the property without paying property taxes or any
4 other costs. As of June 30, 2011, with accrued unpaid payments, late
5 charges, and fees, Erica Kim's current outstanding unpaid loan balance
6 is approximately \$1,471,461.95. Optional and Honig seek to enjoin
7 EWB's planned trustee sale on the ground that such a sale jeopardizes
8 their claims to the property. Those claims include Optional's
9 putative interest in the property as asserted through its claim to the
10 property based on Erica Kim's alleged conversion of Optional's assets,
11 and a judgment lien for the 37 billion Korean won judgment it obtained
12 in a related case. Honig also has a charging lien for attorney's
13 fees. The Court issued a TRO to maintain the status quo pending
14 briefing on the preliminary injunction.

15 16 **II. LEGAL STANDARD**

17 "A plaintiff seeking a preliminary injunction must establish that
18 he is likely to succeed on the merits, that he is likely to suffer
19 irreparable harm in the absence of preliminary relief, that the
20 balance of hardships tips in his favor, and that an injunction is in
21 the public interest." Winter v. Natural Res. Defense Council Inc.,
22 129 S.Ct 365, 374 (2008). While Winter expressly rejected the view
23 that a mere "possibility" of irreparable harm could be sufficient to
24 justify a preliminary injunction in some instances, it did not
25 otherwise reject the so-called "sliding scale" approach, and the
26 "serious questions" formulation in particular, employed in a number of
27 circuits, including the Ninth Circuit. See Alliance for the Wild
28 Rockies v. Cottrell, 632 F.3d 1127, 1131-1133 (9th Cir. 2011) (holding

1 that the sliding scale approach remains viable after Winter, as long
2 as it is applied as part of the four-element Winter test). Thus,
3 under the "serious questions" variation of the sliding scale approach,
4 (1) "serious questions going to the merits," and (2) a balance of
5 hardships that tips sharply towards the movant can support issuance of
6 a preliminary injunction, so long as the movant also shows that there
7 is (3) a likelihood of irreparable injury and (4) that the injunction
8 is in the public interest. Alliance for the Wild Rockies, 632 F.3d at
9 1135.

10 11 III. DISCUSSION

12 The Court finds that a preliminary injunction is warranted under
13 the "serious questions" approach. In summary, EWB's submission
14 opposing a preliminary injunction has not dissuaded the Court from the
15 reasoning it set out briefly in its order issuing the TRO.

16 **A. Optional and Honig have Demonstrated the Existence of a "Serious 17 Question" Going to the Merits.**

18 Optional and Honig argue that their interests in the property
19 will be jeopardized if EWB goes forward with the trustee sale.
20 Specifically, Optional contends that Erica Kim purchased the property
21 using money that was wrongfully converted from Optional, resulting in
22 a constructive trust in Optional's favor that has priority over EWB's
23 interest in the property. Optional contends that selling the property
24 in a trustee sale will diminish its value. EWB contends that
25 Optional's position is meritless because, as an evidentiary matter,
26 Optional cannot trace the money from its accounts, through Erica Kim,
27 to the property. EWB also asserts that as a bona fide lender without
28 notice of Optional's claim, its lien on the property is superior even

1 if Optional can prove its constructive trust. EWB also asserts that
2 Optional's constructive trust claim as to the property was
3 extinguished by res judicata in Optional's related case against the
4 Kims. As such, EWB contends, Optional cannot demonstrate a
5 constructive trust or any claim to the property superior to EWB's
6 lien.

7 The Court notes that most of the issues on which this motion
8 turns are raised for the first time herein and in a fairly cursory
9 manner that is insufficient to support a strong prediction as to their
10 merits. For example, EWB's res judicata argument and its argument
11 that it is a bona fide lender without notice have not been raised
12 before, and they are briefed herein only in passing; EWB has not
13 supported its bona fide lender argument with citations to law or to
14 evidence. Its bona fide lender argument cannot, therefore, prevail
15 even in opposition to a preliminary injunction. Indeed, at the May 2,
16 2011 status conference, EWB indicated that it would file a motion to
17 resolve lien priority so that it could establish, to the Court's
18 satisfaction, its right to foreclose. Evidently, at that time, EWB
19 acknowledged that the competing claims to the property counseled
20 against unilaterally foreclosing on the property.

21 Substantively, although, as EWB points out, some of the
22 evidentiary issues relevant to Optional's claim were addressed in the
23 March 13, 2007 summary judgment order dismissing the Government's
24 forfeiture claim, the impact of those determinations has yet to be
25 fleshed out as to Optional's claim. Indeed, the Ninth Circuit
26 remanded the matter to this Court for the express purpose of
27 adjudicating the competing claims, including Optional's claim and
28 EWB's claim. This supports the view that there is at least a "serious

1 question" that Optional's claim to the property may be superior to
2 EWB's claim.

3 There are also serious legal questions implicated by EWB's desire
4 to sell the property, especially since the outcome of the sale is not
5 clear. For example, EWB asserts that Optional's two lis pendens
6 recorded against the property are sufficient to notify any purchaser
7 that title to the property is in dispute, and that Optional's rights
8 are therefore preserved under Cal. Code Civ. P. § 405.24. But it
9 appears that EWB expects that no one will purchase the property and
10 that EWB would assume ownership. See Honig Response 2:23-28, and
11 Reply 3:6-8. EWB has not explained what would happen in that
12 scenario.

13 As to Honig's charging lien, EWB has not disputed that a
14 trustee's sale would extinguish that lien. Such an outcome may or may
15 not be just, but it is a serious question as to which the present
16 briefing is insufficient to support a strong prediction on the merits.
17 As discussed and agreed to at the May 2 status conference, the proper
18 vehicle for determining lien priority is the motion that EWB stated it
19 would file - a motion to adjudicate lien priority - not a trustee sale
20 not subject to Court oversight.

21 The Court therefore concludes that there is at least a serious
22 question that Optional's and Honig's interests in the property would
23 be unjustifiably and negatively affected by EWB's contemplated trustee
24 sale.

25 **B. The Balance of Hardships Tips Sharply In Favor of Optional and**
26 **Honig.**

27 That EWB wants to remove Erica Kim from a property she has been
28 in default on and resided in for free for approximately the last three

1 years is certainly understandable. However, EWB has not explained the
2 urgency behind undertaking a trustee sale at this moment rather than
3 first filing the lien priority motion it said it would bring. Perhaps
4 EWB believed a lien priority motion would result in too much delay,
5 but given the recent events in Switzerland, EWB should have recognized
6 that this Court would not view favorably any party's unilateral
7 attempt to disturb the assets under the Court's jurisdiction. EWB's
8 attempt to move forward with the trustee sale before establishing lien
9 priority has therefore only delayed EWB's remedy.

10 Furthermore, even if EWB were correct that prior motion work
11 would delay its remedy, the Court cannot find that such a delay works
12 any great hardship here. While delaying EWB's ability to foreclose is
13 regrettable in light of Erica Kim's long-standing default on the
14 property, that delay does not constitute irreparable harm. In
15 contrast, as discussed below, the trustee sale may irreparably harm
16 Optional's and Honig's ability to realize their liens and other
17 interests.

18 Finally, no party has discussed the availability of a different
19 procedure (other than the trustee sale) or perhaps an agreement that
20 would remove Erica Kim from the property but not jeopardize competing
21 claims or existing liens. Unless the trustee sale EWB contemplates is
22 tantamount to a last resort invoked for an urgent reason, the Court
23 would be reluctant to allow the sale to go forward under the
24 circumstances of this case.

25 The Court concludes that the balance of hardships tips sharply in
26 Optional's and Honig's favor.

1 **C. Optional and Honig Face a Likelihood of Irreparable Injury.**

2 Optional and Honig face a likelihood of irreparable injury on two
3 bases. First, given the depressed state of the real estate market
4 today, of which the Court *sua sponte* takes judicial notice, if the
5 property sells, there is a likelihood that it will be at a depressed
6 price. EWB will therefore realize fewer proceeds to pay other
7 lienholders, such as Optional and Honig. Another way to state this
8 injury is that the value of the property is likely to be reduced by
9 selling it now. Second, as mentioned above, although it is unclear
10 how a trustee sale will operate as to some of the other liens, it
11 seems clear that a sale would extinguish Honig's charging lien.
12 Having a lien extinguished is an irreparable injury. Optional and
13 Honig therefore face a likelihood of irreparable injury.

14 **D. An Injunction is in the Public Interest.**

15 Finally, an injunction is in the public interest. There is a
16 strong public interest in the orderly disposition of the assets in
17 this case. The issues must be fully vetted, including lien priority
18 and whatever other issues are relevant, before the properties are
19 distributed or otherwise allowed to be alienated. The Ninth Circuit
20 ordered this Court to adjudicate the competing claims, and the public
21 interest is best served by this Court's carrying out that duty. In
22 contrast with the Swiss account, the property at issue in this Motion
23 is within the Court's jurisdiction and is subject to its control. The
24 public interest is best served by this Court's exercising that
25 jurisdiction and forestalling anything like the loss of assets that
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1 occurred in Switzerland.¹

2 **E. The Trustee Sale Is Also Enjoined Under the Court's Inherent**
3 **Authority.**

4 As distinct from the preliminary injunction standard discussed
5 above, the Court finds that enjoining a trustee sale pending further
6 proceedings is within the Court's inherent case-management authority.
7 As all parties are aware, the Ninth Circuit pointed out that the Court
8 retains ancillary jurisdiction to adjudicate the remaining claims, and
9 indeed has the duty to do so. Allowing the property to be disposed of
10 in a trustee sale before adjudicating the competing claims is
11 inconsistent with this duty.

12 **IV. CONCLUSION**

13 For the foregoing reasons, the Court finds that a order enjoining
14 the trustee sale is warranted under both the preliminary injunction
15 standard and as a function of the Court's inherent authority. The
16 Court therefore **ENJOINS** East West Bank from undertaking a Trustee Sale
17 with respect to the property at 924 N. Beverly Drive, Beverly Hills,
18 California, pending further proceedings in this case.

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20 **DATED: July 18, 2011**



21
22 **AUDREY B. COLLINS**
23 **CHIEF UNITED STATES DISTRICT JUDGE**
24

25 ¹ The Court is not implying that EWB's conduct is akin to the
26 conduct of the parties responsible for what occurred in Switzerland.
27 Rather, the Court is pointing out that there may be the same
28 undesirable results: that the property's value may be diminished and
that other claimants may lose the opportunity to have their claims
properly adjudicated.